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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ALFREDO M. VASQUEZ, Defendant and Appellant.	A144658 (San Mateo County Super. Ct. No. SC073489A)

After a jury trial, appellant Alfredo M. Vasquez (Vasquez) was found guilty of 68 felonies arising out of the repeated sexual abuse of his daughter, Jane Doe, from the time she was 11 years old until his arrest when she was 15. On appeal, Vasquez argues the trial court erred in refusing to admit evidence Jane had sexual intercourse with her boyfriend on the day she disclosed her father's abuse. He further claims the trial court committed evidentiary error in admitting the entirety of Jane's videotaped statement to the police. Finally, Vasquez takes issue with the modified unanimity instruction given in this case. Finding all of Vasquez's arguments unpersuasive, we affirm.

I. BACKGROUND

Jane Doe was born in Guatemala in 1995. Vasquez is her father. Jane lived in Guatemala with her grandparents until 2006 when, at age 11, she moved to California to reside with her parents. When Jane first joined her parents in their apartment, her aunt

and a sister slept in the only bedroom. The rest of the family slept on blankets on the living-room floor. Jane would lay on her side, with Vasquez sleeping behind her. At some point, the sleeping arrangements changed. Jane and Vasquez slept in one of the beds in the bedroom, while Jane's mother and two younger siblings slept in the other bed. Since her parents both worked at night as janitors, they usually slept during portions of the day, including during the early-evening hours after dinner before they left for work.

On November 9, 2010, Jane skipped school because she "didn't want to be" there. Instead, she and her boyfriend went to a park for several hours and then spent time together at a mall. Thereafter, she and her boyfriend went to a friend's house. According to this friend, Jane had been with her boyfriend for several months and really wanted to be with him, despite Vasquez's objections. Jane had previously disclosed to the friend that her father, Vasquez, had been abusing her. The friend told her mother, who then talked to Jane. After discussing the situation, the police were called.[1]

When she was interviewed by the police, Jane disclosed that Vasquez began touching her inappropriately when she was 11 years old. Specifically, he would rub her through her clothes on her butt, vagina, and breasts while they were laying down to sleep in the evenings on the living-room floor. This happened about three or four times when she was 11. According to Jane, Vasquez had intercourse with her for the first time when she was 12. At that time, her mother was attending "baby school" with Jane's infant sister on Saturdays and Sundays, and Jane believed the first act of intercourse occurred on a weekend while her mother and sister were at this baby school. Thereafter, intercourse continued about three or four times a month. Jane's mother and sister attended the baby school regularly for about two years. After that, Vasquez continued to have intercourse with her while her mother slept or was in the shower. The last time was about three weeks before she spoke to the police. Jane also remembered painful anal intercourse when she was 14. Initially, this appeared to be ongoing, but later in the police interview she clarified that it had only happened once because she had cried. In addition,

[1] It is not clear from the record whether Jane or her friend's mother called the police.

Vasquez started putting his penis in Jane's mouth when she was 15. He did this a total of six to ten times. Vasquez also performed oral sex on Jane; she believed this occurred from the time she was 11, although she was not certain.

When she was 13, Vasquez told Jane their sexual acts were normal and not wrong. Later, he cautioned her that she should not tell her friends because he could go to jail. Jane did tell her mother that Vasquez "raped" her when she was 13, but her mother did nothing to protect her. According to Jane, Vasquez was adamant that she not have a boyfriend. On the day she disclosed the abuse to her mother, Vasquez had learned she was electronically communicating with a boyfriend and was very angry. He kneed her in the back, slapped her face, gave her a nosebleed, and broke her laptop computer. The week before Jane spoke to the police, Vasquez saw Jane with her current boyfriend at the bus stop and yelled at her, threatening to beat her up. In the end, he slapped her while complaining about the boyfriend.

After her interview, Jane made two pretext calls to Vasquez at the behest of the police. In the second call, she told him she was afraid because a teacher believed she and Vasquez were having sex. Vasquez responded, "Oh[,] don't be embarrassed[,] let's see how we can fix that." He also reminded her he had told her in the past not to say anything. Vasquez additionally stated, "I always asked you if you really loved me or just out of fear." He further claimed: "[E]verything that happens with you is not by force. No. Everything happens willingly." Vasquez also urged Jane to return home, stating that he would not harm her, despite his earlier threat to beat or kill her.

In an interview with police after he was arrested, Vasquez initially stated the sex happened "maybe once" when Jane was "like fourteen" and was an act of stupidity. He claimed Jane was lying about things starting when she was 11. Vasquez later admitted that the sex happened "once in a while," starting when Jane was 14 "more or less." Vasquez specifically admitted that he touched Jane in a sexual way for about six months, then had intercourse with her maybe once a month. He acknowledged two acts of anal sex and also stated Jane would put his penis in her mouth, and he would perform oral sex

on her. Vasquez stated this happened because Jane fell in love with him. He admitted that he had recently threatened to kill Jane because she had a boyfriend.

As a result of Jane's disclosures and the ensuing investigation, an amended information was filed in San Mateo County Superior Court on November 13, 2013, charging Vasquez with 36 felony counts of lewd and lascivious acts on a child under the age of 14 (Pen. Code, § 288, subd. (a)[2]); one felony count of sodomy with a person under the age of 16 (§ 286, subd. (b)(2)); ten felony counts of sexual intercourse with a child under the age of 16 (§ 261.5, subd (d)); 21 felony counts of oral copulation with a child under the age of 16 (former § 288a, subd. (b)(2), now § 287, subd. (b)(2)); and one count of felonious threats (§ 422).[3]

During the trial, Jane's testimony regarding the alleged abuse was both consistent and inconsistent with her earlier police interview. For instance, Jane continued to maintain the lewd touching began when she was 11, but stated it went on three or four times a month until she was 15. Jane confirmed intercourse began when she was 12 and happened three to four times a month thereafter. However, she testified that, after the first time, intercourse happened in the evenings when she was 12 and 13 and stated she did not remember whether her mother was attending baby school after the first occurrence. According to Jane's trial testimony, the first incident of anal intercourse happened when she was 13 (not 14, as stated during her interview), and the episode with the broken computer happened about six weeks before she disclosed the abuse to the police (not on the day she disclosed to her mother, as she had told the police). Jane also testified at trial that Vasquez never threatened to hurt her.

Jane's brother and sister testified at trial about the family's living arrangements. Her brother did not think the sex happened. Her sister testified she never saw Vasquez alone with Jane. Jane's cousin and uncle both testified Vasquez was not a violent person.

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[2] All statutory references are to the Penal Code unless otherwise specified.

[3] The trial court later dismissed the felonious threats count.

Finally, a representative from an early-intervention program for children with special needs testified that Jane's mother and baby sister attended several times a week from April 2008 to May 2009, but never on weekends.

At the conclusion of the trial on November 21, 2013, the jury found Vasquez guilty as charged on all counts. Thereafter, on March 20, 2015, the trial court sentenced Vasquez to an aggregate term of 48 years in state prison. This timely appeal followed.

II. DISCUSSION

A. *Refusal to Admit Specific Evidence of Victim's Sexual Conduct*

Vasquez first argues the trial court erred by excluding evidence that, on the day she reported Vasquez's abuse to police, Jane had sexual relations with her boyfriend at a local park. During trial, the trial court held a hearing at which Jane testified on this issue outside the presence of the jury, in accordance with Evidence Code section 782. Defense counsel claimed Jane's sexual activity with her boyfriend on the day she disclosed was highly probative on the issue of her credibility because it was fundamentally inconsistent with the emotionally traumatic and momentous step she was purportedly planning to take. The trial court disagreed, providing a lengthy and articulate ruling.

Preliminarily, the court noted Jane's decision to leave school and be with her boyfriend on that day cut both ways with respect to her credibility. In fact, the court found it not "necessarily unlikely" Jane might have wanted to be out of school and with her "best friend in the world," even being intimate, on such a day. The court then correctly framed the issue before it as follows: "The question for this court is whether the fact that they were intimate that day has any relevance, and if it has any relevance to her credibility as a witness . . . whether the fact of being intimate over that hour and a half is so probative of her credibility that it outweighs the prejudicial nature of delving into that testimony. It's not relevant as to whether or not she consents to an act with her father in any way. [¶] . . . [¶] And that's the nub of it, whether or not—everything else that happened that day can be reported and examined on, but for—including that they went to a private place in the park where they could be alone, but for whether they engaged in sexual conduct at that time or not. And counsel's argument seems to be that it strains

credulity that a 15-year-old girl in an emotional situation like that would have intimate relations with a 15- or 16-year-old boy to such an extent that it is probative more than it is prejudicial."

After indicating it had heard testimony and argument, reviewed the pleadings, and considered relevant case law and treatises, the trial court found Jane's sexual activity on the day in question to be, "if relevant at all, . . . of de minimis relevance to her credibility as a witness, at most. That's if it's relevant at all. But it is undeniably prejudicial, insofar as it is—or could be taken as bad character evidence of the complaining witness and used in that fashion more so than as an explanation for anything she did or didn't do vis-a-vis reporting her father that, under 352, I think it is far more prejudicial than it is probative."

We agree with the trial court. Jane's intimate act with her boyfriend on the day she spoke to the police had little, if any, relevance to her credibility with respect to the charged offenses. While the fact that Jane had a boyfriend against her father's wishes was arguably relevant to her credibility—giving her a potential motivation to lie about the abuse—other evidence admitted at trial made this clear, and defense counsel mentioned it repeatedly during closing argument. Thus, the jury was well aware Jane's relationship with her boyfriend might have given her a reason to fabricate the molestation allegations. That Jane and her boyfriend had been intimate on the day she first met with police adds little to this mix, especially given the significant boost her credibility had already received from Vasquez's admission that the sexual abuse she described after age 14 actually occurred.

Defense counsel's trial theory that the information was relevant because Jane's sexual activity was somehow inconsistent with her plan to make serious abuse allegations later that same day is unpersuasive and does not change our relevance calculus. Indeed, Vasquez abandons this argument on appeal. Instead, acknowledging Vasquez's admissions with respect to the over-14 abuse, appellate counsel admits "[t]he sole contested issue in this case was, did [he] start having sex with his daughter before she was 14, or only after?" Counsel then claims Jane's sexual behavior was relevant to this issue, because—after preparing herself to sever ties with her family and cementing her

relationship with her boyfriend through this sexual act—"it was very much in her interest to make sure that appellant would not return to her life until she was an adult living on her own." In other words, she had a motive to lie regarding the more serious charges alleged to have occurred before she was 14, because it would dramatically increase Vasquez's punishment. We find this argument—which we note could be made without reference to Jane's sexual conduct—both improbable and nonsensical.

Preliminarily, it appears exceedingly unlikely Jane, at age 15, would have been aware of the heightened punishment accorded abusers who molest children under the age of 14. More importantly, however, making up additional crimes was entirely unnecessary to achieve her purported goal—ridding herself of her father until she became an independent adult. Vasquez faced a possible 100-year prison sentence in this case, based on a fraction of the possible offenses with which he could have been charged under the circumstances alleged. As the Attorney General persuasively argues, it makes no sense—given the years of sexual abuse she described and which Vasquez largely admitted—that Jane would have thought more would be necessary to keep Vasquez incarcerated during the less-than-three years it would take for her to turn 18. Indeed, Vasquez was not even tried until she had reached her majority.

Jane's sexual conduct under these circumstances, then, was largely irrelevant. In contrast, as the trial court recognized, the possible prejudicial effect from admission of such evidence could be substantial. Our high court has summarized the scope of the potential prejudice in this context as follows: "The potential prejudice of [evidence of past sexual relations], on the other hand, was substantial. (*U.S. v. One Feather* (8th Cir. 1983) 702 F.2d 736, 739 [the policy of the rape shield law 'to guard against unwarranted intrusion into the victim's private life . . . may be taken into account in determining the amount of unfair prejudice'].) For some jurors, the fact that the victim has engaged in sexual conduct outside of marriage automatically suggests a receptivity to the activity or is proof that the victim got what she deserved—neither of which is a rational or permissible inference. (*U.S. v. Kasto* (8th Cir. 1978) 584 F.2d 268, 271–272.) In addition, the Legislature has determined that victims of sexual assault require greater

protections beyond those afforded other witnesses against surprise, harassment, and unnecessary invasion of privacy (see generally *Government of Virgin Islands v. Scuito* (3d Cir. 1980) 623 F.2d 869, 875–876), and defendant's inquiry would have violated those interests, particularly the state interest 'to encourage reporting by limiting embarrassing trial inquiry into past sexual conduct.' (*Wood v. Alaska* (9th Cir. 1992) 957 F.2d 1544, 1522.)." (*People v. Fontana* (2010) 49 Cal.4th 351, 370 (*Fontana*).) On these facts, we believe the potential for prejudice as articulated in *Fontana* tips the scale decisively in favor of excluding the evidence of Jane's sexual encounter with her boyfriend.

Indeed, although appellant's counsel claims the concerns expressed in *Fontana* are outmoded, his other argument on this topic—if it is worthy of any comment at all—is notable solely because it illustrates exactly the type of prejudicial thinking condemned by the *Fontana* Court. As stated above, when he was interviewed by the police prior to his arrest, Vasquez claimed Jane was in love with him and had initiated many of the sexual acts at issue. Crediting these self-serving statements as "the only possible explanation" for Jane's repeated abuse,[4] counsel argues on appeal that the jury would not have been inflamed by evidence of Jane's "tryst" with her boyfriend because they would have considered the fact she had "switch[ed] her affections" to her age-appropriate boyfriend "the proper and right thing for her to do." Of course, in attempting to equate Jane's teenage relationship with the years of repeated molestation she endured at the hands of her father, counsel seeks to inject the idea that Jane was sexually promiscuous and

[4] Incredibly, counsel bases this conclusion on the offensive suggestion that Jane must have *wanted* to engage in sex with her father because, had she not, the young, vulnerable immigrant child would simply have slept elsewhere or said no. Suffice it to say that review of the relevant psychological literature on the sexual abuse of children demonstrates the fallacy of this argument. (See, e.g., National Center for Victims of Crime, *Effects of Child Sexual Abuse on Victims* (2012) at <http://victimsofcrime.org/media/reporting-on-child-sexual-abuse/effects-of-csa-on-the-victim> [as of January 28, 2019] ["Victims may feel powerless because the abuse has repeatedly violated their body space and acted against their will through coercion and manipulation"].)

thereby support Vasquez's claim that she initiated the sex. Moreover, evidence of Jane's sexual conduct with her boyfriend might mislead the jury into excusing or minimizing Vasquez's conduct, even though consent is unavailable as a defense under these circumstances. (See, e.g., *People v. Soto* (2011) 51 Cal.4th 229, 238 [as children under 14 cannot give valid legal consent to sexual acts with adults, child victim's alleged consent in section 288 cases is "immaterial *as a matter of law*" (italics in original)].)

In short, none of Vasquez's contentions gives us cause to disturb the trial court's determination of this matter, which is reviewable on appeal solely for abuse of discretion. (*Fontana*, *supra*, 49 Cal.4th at p. 370.) Moreover, since we conclude that the trial court did not abuse its discretion in refusing to admit evidence of Jane's sexual activity with her boyfriend, we likewise reject Vasquez's claim that this ruling deprived him of his constitutional rights to confront witnesses or present a defense. (See *People v. Snow* (2003) 30 Cal.4th 43, 90 [application of the rules of evidence generally does not support a constitutional violation; evidence of marginal probative value "certainly" does not fall outside this general rule].)

B. Admissibility of Videotaped Statement to Police

As mentioned above, Vasquez also argues the trial court erred in allowing the prosecutor to play for the jury the entirety of Jane's videotaped statement to police. When the prosecutor sought the trial court's permission to play the recording for the jury, defense counsel objected on hearsay grounds. The trial court overruled the objection, based on the prosecutor's representation that the "audio statement or videotape, anyway, the statement by the complaining witness, is rife with prior consistent and inconsistent statements based on the testimony she's given over the last two court days." The court additionally acknowledged the prosecutor's reliance on Evidence Code section 356 (Section 356). According to Vasquez, the trial court erred in finding the entire interview admissible because defense counsel mentioned it only briefly during Jane's cross-examination; no part of the interview was actually admitted into evidence; the prosecutor failed to describe in detail the basis for the admission of each consistent or inconsistent

statement; and the entire interview was not " 'on the same subject' ", as required by Section 356. We are not persuaded.

Initially, we note the parties expend significant energy arguing over whether the requirements for the admission of inconsistent and consistent prior statements have been met in this case. Clearly, as detailed above, Jane's trial testimony and her previous statement to police were inconsistent in a number of respects and consistent in others. Since Jane had been excused subject to recall after her trial testimony, her prior *inconsistent* statements were admissible. (Evid. Code, §§ 770, 1235.) Moreover, once Jane's credibility was attacked by reference to her prior statement, as we discuss further below, her prior *consistent* statements may also have been admissible. (*Id.*, §§ 791 [admission of prior consistent statements permitted to support credibility after evidence of a prior inconsistent statement has been admitted for the purpose of attacking credibility], 1236.) However, we think the better approach in this case is to analyze the prior interview's admissibility under Section 356, especially since both parties have declined to parse the interview and argue the admissibility question on a statement-by-statement basis.

Section 356 "is sometimes referred to as the statutory version of the common law rule of completeness." (*People v. Parrish* (2007) 152 Cal.App.4th 263, 269, fn. 3 (*Parrish*).) The statute provides that when part of a conversation or writing is given in evidence by one party, "the whole on the same subject may be inquired into by an adverse party." (Evid. Code, § 356.) "The purpose of Evidence Code section 356 is 'to prevent the use of selected aspects of a conversation, act, declaration, or writing, so as to create a misleading impression on the subjects addressed.' " (*People v. Clark* (2016) 63 Cal.4th 522, 600 (*Clark*); *Parrish*, at p. 273; see also *Beech Aircraft Corp. v. Rainey* (1988) 488 U.S. 153, 171 [according to the common law rule, " '[t]he opponent, against whom a part of an utterance has been put in, may in his turn complement it by putting in the remainder, in order to secure for the tribunal a complete understanding of the total tenor and effect of the utterance' "].)

Our high court has "taken a broad approach to the admissibility of the remainder of a conversation under Evidence Code section 356." (*Clark, supra*, 63 Cal.4th at p. 600.) Thus, in applying the statute, "the courts do not draw narrow lines around the exact subject of inquiry." (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1174 (*Hamilton*).) Rather, " '[i]n the event a statement admitted in evidence constitutes part of a conversation or correspondence, the opponent is entitled to have placed in evidence all that was said or written by or to the declarant in the course of such conversation or correspondence, provided the other statements have *some bearing upon, or connection with*, the admission or declaration in evidence.' " (*Ibid.*) We review the admission of evidence under Section 356 for abuse of discretion. (*Parrish, supra*, 152 Cal.App.4th at p. 274.)

Here, Vasquez claims defense counsel's "brief" mention of Jane's prior police interview during cross-examination was insufficient to justify the admission of the entire recording under Section 356, especially since no portion of the interview was actually entered into evidence. We find this statement both factually and legally incorrect. First, our own review of the record reveals defense counsel's use of the interview during cross-examination was far from "brief." Rather, he repeatedly referenced it in an attempt to undermine Jane's credibility. In fact, he began his cross-examination by mentioning the interview and eliciting testimony from Jane stating she had been given a transcript of the interview by the prosecution in preparation for her trial testimony and had been told it was important for her testimony to match the transcript. Thereafter, defense counsel referred to the interview to challenge numerous aspects of Jane's direct examination, including her testimony regarding: Jane's aunt living in the home when Jane first moved there; the family's sleeping and work arrangements at various times; molestations occurring during her mother's "baby school" attendance; injuries she sustained during her first experiences with vaginal and anal intercourse; the frequency of intercourse and oral sex; the specifics regarding an incident when her father saw her at the bus stop with her boyfriend; and whether she was more truthful during her police interview or her trial testimony.

Under these circumstances, the fact the interview was never formally entered into evidence is of no legal import. Indeed, our Supreme Court addressed and rejected an identical argument in *Clark*, *supra*, 63 Cal.4th 522. In that case, the defendant challenged the admission under Section 356 of the entirety of a series of police interviews with a witness, arguing defense counsel only used the transcript on cross-examination to refresh the recollection of the witness, and "no portion" of the transcript was ever entered into evidence. (*Id.* at pp. 599–600.) Our high court concluded that, by cross-examining the witness concerning the interview, the defendant "put the conversation itself into evidence as a subject of cross-examination." (*Id.* at p. 600.) Admission of the tape recordings thus was proper under Section 356 because "whatever the form of the evidence, the 'subject of inquiry' under Evidence Code section 356 concerned the same conversation, the one [the officer] had with [the witness]." (*Ibid.*)

In this case, then, admission of the entire recorded interview was permissible once defense counsel made it a subject of cross-examination, assuming the other requirements of section 356 were met. We conclude they were. The police interview involved the molestation allegations and therefore clearly had " 'some bearing upon, or connection with' " the statements referenced by defense counsel. (*Hamilton*, *supra*, 48 Cal.3d at p. 1174, italics omitted.) In addition, as stated above, Vasquez sought to undermine Jane's credibility by repeatedly referencing the interview and implying her trial testimony was inconsistent and self-serving. But Vasquez was telling only one side of the story. Other portions of Jane's prior interview tended to bolster her credibility. Thus, excluding those statements would have created a misleading impression on this crucial topic. In fact, as we discuss further below, credibility is usually the "true issue" in molestation cases such as this one. (*People v. Moore* (1989) 211 Cal.App.3d 1400, 1414.) Undoubtedly, the best way for the jury to judge a victim's credibility in such a situation is by hearing everything the victim has had to say on the subject of the alleged molestation. Thus, it is difficult to fault the trial court's decision in this case to admit the entirety of Jane's prior police interview. Certainly, there was no abuse of discretion.

C. Modified Unanimity Instruction

A criminal defendant's right to a jury trial includes the right to a unanimous verdict, including unanimous agreement on the act constituting the offense charged. (Cal. Const., art. I, § 16; *People v. Russo* (2001) 25 Cal.4th 1124, 1132 (*Russo*).) "[C]ases have long held that when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act." (*Russo*, at p. 1132.) "This requirement of unanimity as to the criminal act 'is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed.' " (*Ibid*.)

Historically, child molestation cases presented difficult issues regarding how properly to instruct a jury on the constitutional requirement of a unanimous verdict when a child-victim testified generically about numerous undifferentiated acts of molestation occurring over a particular period of time—i.e., "an act of intercourse 'once a month for three years.' " (*People v. Jones* (1990) 51 Cal.3d 294, 314 (*Jones*).) However, in *Jones*, our high court soundly rejected the contention that "jury unanimity is necessarily unattainable where testimony regarding repeated identical offenses is presented in child molestation cases. In such cases, although the jury may not be able to readily distinguish between the various acts, it is certainly capable of unanimously agreeing that they took place in the number and manner described." (*Id.* at p. 321.) Thus, the *Jones* court concluded, a child-victim must only provide evidence with respect to the kind of act or acts committed, the number of acts, and the general timeframe in which the acts occurred. (*Id.* at p. 316.) While "[a]dditional details regarding the time, place or circumstance of the various assaults *may assist in assessing the credibility or substantiality of the victim's testimony*," such ancillary matters are "not essential to sustain a conviction." (*Id.* at p. 316, italics added.)

To safeguard the constitutional requirement of unanimity under these circumstances, the *Jones* court further directed as follows: "In a case in which the evidence indicates the jurors might disagree as to the particular act defendant committed,

the standard unanimity instruction should be given. [Citation.] But when there is no reasonable likelihood of juror disagreement as to particular acts, and the only question is whether or not the defendant in fact committed all of them, the jury should be given a modified unanimity instruction which, in addition to allowing a conviction if the jurors unanimously agree on specific acts, also allows a conviction if the jury unanimously agrees the defendant committed all the acts described by the victim." (*Jones*, *supra*, 51 Cal.3d at pp. 321–322.) This is exactly what was done in this case.

Specifically, when addressing the issue of unanimity in these proceedings, the trial court first reiterated to the jury that Vasquez was charged with 36 counts of lewd acts on a minor under the age of 14; 10 counts of unlawful sexual intercourse with a minor under the age of 16; and 21 counts of oral copulation with a minor under the age of 16, all in various relevant timeframes. The court then instructed the jury in accordance with CALCRIM 3501 as follows: "The People have presented evidence of more than one act to prove that the defendant committed these offenses. [¶] You must not find the defendant guilty unless: [¶] *One*, you all agree that the People have proved that the defendant committed at least one of these acts, and you all agree on which act he committed for each offense; *or, two,* you all agree that the People have proved that the *defendant committed all the acts alleged to have occurred during this time period* and have proved that *the defendant committed at least the number of offenses charged*. [¶] Each of the counts charged in this case is a separate crime. [¶] You must consider each count separately and return a separate verdict for each one." (Italics added.)

CALCRIM No. 3501—the instruction given by the trial court—is an alternative instruction to the general unanimity instruction, CALCRIM No. 3500. (*People v. Fernandez* (2013) 216 Cal.App.4th 540, 555 (*Fernandez*).) It "affords two different approaches for the jury to reach the required unanimity. The first is the same as that set forth in CALCRIM No. 3500: agreement as to the acts constituting each offense. But unanimity may also be found under CALCRIM No. 3501 if the jury agrees 'that the People have proved that the defendant committed all the acts alleged to have occurred

during this time period [and have proved that the defendant committed at least the number of offenses charged].' " (*Fernandez,* at p. 556.)

Vasquez asserts it was error to give the modified unanimity instruction in this case because—given the mix of specific and generic evidence presented—it may have led the jury to convict without being truly unanimous. We review a claim of instructional error de novo. (*People v. Hernandez* (2013) 217 Cal.App.4th 559, 568.) In doing so, "we view the challenged instruction in the context of the instructions as a whole and the trial record to determine whether there is a reasonable likelihood the jury applied the instruction in an impermissible manner." (*People v. Houston* (2012) 54 Cal.4th 1186, 1229.) As a baseline, "[w]e assume the jurors are intelligent persons capable of understanding and correlating all jury instructions given them." (*People v. Milosavljevic* (2010) 183 Cal.App.4th 640, 649.)

On appeal, Vasquez asserts the jury in this case *must* have been confused with respect to the unanimity instruction, because it convicted him of all 36 counts of lewd acts on a minor under the age of 14, even though he presented irrefutable evidence Jane's mother never attended developmental classes with Jane's younger sister on weekends, a time during which Jane reported some of these molestations occurred. According to Vasquez, since there was no testimony supporting 36 specific acts during the under-14 timeframe, the jury must have relied on Jane's generic testimony to convict. Given this record, Vasquez asserts it was unlikely that every juror believed he "committed all the acts alleged to have occurred during this time period." Additionally, if some jurors convicted on those counts based on the "baby school" molestations while others—convinced the "baby school" molestations never happened—based their convictions on the acts of nighttime lewd touching and intercourse also alleged during the same timeframe, there is a "real chance," Vasquez urges, the verdicts were not truly unanimous as to the underlying acts committed.

We are not convinced that the jury was misled with respect to unanimity in this case. Instead, it appears the jury applied the unanimity instruction exactly as it was intended, to provide a pathway to conviction where "[a] young victim such as [Jane],

assertedly molested over a substantial period by a parent or other adult residing in [her] home, may have no practical way of recollecting, reconstructing, distinguishing or identifying by 'specific incidents or dates' all or even any such incidents." (*Jones*, *supra*, 51 Cal.3d at p. 305.) The instruction given in this case was quite clear: To convict on each count charged, the jury either had to agree on a specific act underlying the charge or agree Vasquez committed *all* of the acts alleged to have occurred during the relevant time period.

The most likely scenario here—and the one which Vasquez simply ignores—is that the jury found Jane wholly credible and believed all of the alleged acts transpired, despite certain inconsistencies in her testimony with respect to timing and circumstances. As the *Jones* Court highlighted, "credibility is usually the 'true issue' in these cases." (*Jones*, *supra*, 51 Cal.3d at p. 322.) Thus, " 'the jury either will believe the child's testimony that the consistent, repetitive pattern of acts occurred or disbelieve it. In either event, a defendant will have his unanimous jury verdict [citation] and the prosecution will have proven beyond a reasonable doubt that the defendant committed a specific act, for if the jury believes the defendant committed all the acts it necessarily believes he committed each specific act.' " (*Ibid.*) In these proceedings, Jane described several specific types of sexual misconduct inflicted upon her by Vasquez repeatedly over the course of years. While, as stated above, details regarding the exact timing, place, or circumstances of the various assaults might have assisted the jury in assessing her credibility, such ancillary matters were not necessary to support the convictions. (*Id.* at p. 316.) Rather, to the extent Vasquez cites discrepancies in Jane's statements, "the inconsistency went only to the weight and credibility of the evidence and, on appeal, we do not disturb the jury's resolution of that inconsistency." (*People v. Tompkins* (2010) 185 Cal.App.4th 1253, 1261.) In short, on these facts (viewed, as we must, in the light most favorable to the prosecution), we see no indication of instructional error.

III. DISPOSITION

The judgment is affirmed.

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Brown, J.

We concur:

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Pollak, P. J.

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Streeter, J.